IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANGELIA M. ANDERSON	:	
v.	:	Civil No. CCB-08-3
UNITED STATES OF AMERICA	:	

MEMORANDUM

Plaintiff Angelia M. Anderson ("Ms. Anderson") has sued the United States in a Federal Tort Claims Act action stemming from alleged medical malpractice. Specifically, Ms. Anderson claims that the care she received at the Veterans Administration Medical Center in Baltimore, Maryland ("VA Hospital") was negligent. The United States has moved to dismiss the case. The issue has been fully briefed and no hearing is necessary. *See* Local Rule 105.6. For the reasons articulated below, the United States's motion will be granted in part and the case will be stayed pending compliance with the Maryland Health Care Malpractice Claims Act.

BACKGROUND

On February 22, 2002, Angelia M. Anderson arrived at the Baltimore VA Hospital complaining of mid to lower back pain. An MRI was performed, which revealed scattered marrow abnormalities throughout Ms. Anderson's lumbar spine; the radiologist "commented that

these findings were suspicious for metastatic disease, and that bone scanning should be performed for further metastatic workup." (Compl. at ¶ 12.) The bone scan was performed on May 13, 2002; the results were abnormal and a bone marrow biopsy performed on July 1, 2002. The biopsy results led to a diagnosis of B-cell lymphoproliferative disease in Ms. Anderson's spine. Ms. Anderson was scheduled to begin chemotherapy on August 26, 2002 and was given a fentanyl patch to control her pain.

Chemotherapy did not begin on August 26th; instead, Ms. Anderson's physicians decided upon a course of observation via blood work and physical examinations. Ms. Anderson was seen again on September 30th, when she reported continued pain on her left side; in response, her pain medication was increased. On December 19, 2002, Ms. Anderson presented to the VA Hospital complaining of increasing pain and troubling new symptoms, including pain and numbness radiating to her foot. After an MRI at the University of Maryland revealed no evidence of cord compression, she was discharged with instructions to report to the neurology clinic. Four days later, she returned to the hospital reporting that she was unable to walk or stand, and that she felt numbness up to the level of her breasts. She was again discharged and instructed to return on December 26th for an MRI.

Ms. Anderson presented to a different local hospital on December 24, 2002, where a physical examination and diagnostic studies revealed an epidural spinal tumor which was compressing her spinal cord. Ms. Anderson underwent a same-day surgery to relieve the spinal compression and remained in the local hospital until December 30th. Ms. Anderson alleges that the VA Hospital "failed to recognize and appreciate signs and symptoms of progressive spinal cord compression due to an epidural spinal tumor which developed as a consequence of

Plaintiff's known cancer." (Compl. at ¶ 21.) Among Ms. Anderson's complaints are the VA Hospital's failure to "conduct adequate physical examinations, to order appropriate tests and studies," "to diagnose the presence of the Plaintiff's epidural tumor," and "to perform or refer the Plaintiff for timely surgical intervention." (*Id.*) She claims to have been left with severe and permanent disability, unending physical pain and emotional anguish, among other negative effects.

The United States has filed a motion to dismiss, arguing that Ms. Anderson has not complied with the requirements of the Maryland Health Care Malpractice Claims Act ("HCMCA" or "the Act"). Specifically, Ms. Anderson failed to file a claim with the Maryland Health Claims Alternative Dispute Resolution Office before filing her present suit. Ms. Anderson counters that the Act does not apply to claims brought under the Federal Tort Claims Act ("FTCA").

ANALYSIS

The standard for evaluating a motion for judgment on the pleadings is the same as for a Rule 12(b)(6) motion to dismiss. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999) ("[V]iewing the Defendants' motion as a Rule 12(c) motion does not have a practical effect upon our review, because we review the district court's dismissal de novo and in doing so apply the standard for a Rule 12(b)(6) motion."). Following the Supreme Court's ruling in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), "[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." 127 S. Ct. at 1965. "Once a claim has been stated

adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 1969 (quoted in *Goodman v. PraxAir*, 494 F.3d 458, 466 (4th Cir. 2007)). Moreover, the "plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65.

The Maryland Health Care Malpractice Claims Act, Md. Code Ann. Cts. & Jud. Proc. § 3-2A-01 *et seq.*, establishes several requirements that must be met before certain medical malpractice actions may be filed. Among these is the requirement that the claim be presented to the Director of the Maryland Health Claims Alternative Dispute Resolution Office. *Id.* at § 3-2A-04(a)(1)(i). The claim must be accompanied by a certificate of qualified expert, which is to be filed with the Director within 90 days from the date of the complaint, and must attest "to departure from standards of care, and that the departure from standards of care is the proximate cause of the alleged injury." *Id.* at § 3-2A-04(b)(1)(i). If the defendant disputes liability, he must file a similar certificate within 120 days from the date that the claimant or plaintiff served her certificate. *Id.* at § 3-2A-04(b)(2)(I). Each party must file the certificate "with a report of the attesting expert attached." *Id.* at § 3-2A-04(b)(3)(i).

Because the FTCA imposes tort liability on the United States "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. § 2674, the substantive law of each state establishes the cause of action. If the Maryland statute is deemed procedural in nature, it will be preempted by federal procedural law. This is not the typical *Erie* situation: in this case, the court's jurisdiction arises not from diversity of citizenship, but from the Federal Tort Claims Act. In federal question cases, the discussion of substantive versus

procedural is still relevant; if the state statute is procedural, the question becomes whether it is preempted by the Federal Rules of Civil Procedure.

The Maryland statute specifies that "the provisions of [the HCMCA] shall be deemed procedural in nature and may not be construed to create, enlarge, or diminish any cause of action not heretofore existing, except the defense of failure to comply with the procedures required under this subtitle." Md. Code Ann. Cts. & Jud. Proc. § 3-2A-10. Several courts to have examined the issue, however, have held that in Federal Tort Claims Act cases, state restrictions on malpractice claims may be deemed substantive and should govern. In *Mayo-Parks v. United States*, 384 F. Supp. 2d 818 (D. Md. 2005), the court noted that "[t]he HCMCA [] 'has substantive aspects which, under *Erie*, must be honored by federal courts.'" *Id.* at 820-21 (quoting *Rowland v. Patterson*, 882 F.2d 97, 99 (4th Cir. 1989)). The opinion did not specify to which aspects of the HCMCA the court was referring, but the comment was made in the context of rejecting the United States's argument that the HCMCA was procedural state law and that the countervailing expert witness certificate requirement did not apply.

Another court within the Fourth Circuit, examining a West Virginia statute that requires a certificate of merit, ruled that the statute was substantive and that the plaintiff was required to comply. *Stanley v. United States*, 321 F. Supp. 2d 805, 807 (N.D.W.Va. 2004). The court noted that although the Fourth Circuit had not addressed the specific issue of whether the statute was substantive or procedural, it "has held that similar statutes are 'substantive.'" *Id.* (citing *Roth v. Dimensions Health Corp.*, 992 F.2d 36 (4th Cir. 1993), and *Davison v. Sinai Hosp.*, 617 F.2d 361

(4th Cir. 1980).[1]

In reaching the same conclusion with regards to a Minnesota law, the court pointed out that if the Minnesota statute was held to be purely procedural (and thus preempted by the Federal Rules in federal question cases), "the anom[a]lous result would be that the federal government would be exposed to liability when a cause of action involving similar conduct would be dismissed in a diversity case or in a state court action." *Oslund v. United States,* 701 F. Supp. 710, 714 (D. Minn. 1988). That court held that the Minnesota statute was substantive. *Id.* The Tenth Circuit has agreed. *See, e.g.*, *Hill v. Smithkline Beecham Corp.*, 393 F.3d 1111, 1117-18 (10th Cir. 2004).

Ms. Anderson also argues that the United States's denial of her administrative claim is a "clear indication of the intent to conduct further litigation before the United States District Court," and that the court should treat that denial as a mutual waiver of the HCMCA's prefiling requirements. (Pl's Opp'n 11.) Apart from the administrative claim proceedings, the court has been presented with no evidence suggesting that the United States has waived the HCMCA requirements, and declines to speculate as to the defendant's intention to conduct further litigation.

Given that the prefiling requirements of the HCMCA are substantive in nature, those requirements apply in FTCA cases, and Ms. Anderson was required to submit her claim to the Maryland Health Claims Alternative Dispute Resolution Office. She did not. As the United States points out, however, the HCMCA is not jurisdictional under Maryland law. *Oxtoby v.*

[1]In both *Roth* and *Davison*, the court's jurisdiction arose from diversity of citizenship, not federal question.

McGowan, 447 A.2d 860, 864-65 (Md. 1982).

Given the circumstances of this case and the closeness of the question, which apparently was not raised by the defendant at any earlier point in the administrative proceedings, the case will be stayed rather than dismissed while the plaintiff satisfies the conditions of the Act, in order to avoid creating any statute of limitations bar. *See Jewell v. Malamet*, 587 A.2d 474, 481 (Md. 1991).

A separate Order follows.

August 8, 2008 /s/

Date Catherine C. Blake
United States District Judge